Commission in selecting cost principles is the need to adhere to sound economic precepts that will enable facilities-based competition to emerge, and avoid the extremes of those parties which would be content with only resale-based competition, or those which resist <u>any</u> form of competition. The point here is simple and significant.

Congress' requirement in Section 252(d)(1) that interconnection and unbundled elements rates: "shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element ..." is central. By rejecting regulatory pricing, and limiting rates to the "cost ... of providing" the service, Congress was mandating the use of <u>economic costs</u>, which are inherently forward-looking (in the sense of being "caused" by the service), as opposed to regulatory costs (which are historically-oriented, and used to calculate total return for the regulated entity). As the <u>Interconnection NPRM</u> correctly observes: "A broad range of parties appears to agree that rates for interconnection and unbundled elements should be based on some type of LRIC methodology, such as, for example, using what some parties refer to as a 'total service long-run incremental cost' (TSLRIC) approach." The fact that some ILECs accept TSLRIC as the appropriate standard, while differing with aspects of its implementation, strongly suggests the wisdom of issuing clear pricing principles while allowing state implementation [23] The attached statement of W.P. Montgomery addresses several contentions concerning the costing aspects of the Interconnection NPRM (Attachment C).

**B. ILEC Recovery of Historical Costs and "Shared Costs."**

The portions of the initial comments which address costing issues focus on two matters: (1) The ILECs' asserted need to recover historical costs which have no cost-causative linkage to their provisioning of services to new entrants; and (2) the ILECs' asserted need to recover future-oriented costs which are "shared," or somehow "joint or common." The first contention is plainly incorrect, and would effectively destroy the ability of new entrants to compete effectively in local markets. The second argument is largely semantic, and could easily be resolved.

The ILECs' requests to recover historical costs (sometimes referred to as embedded costs) which bear no causation to the services provided to interconnectors is flatly inconsistent with Congress' requirement in Section 252(d)(1) that such rates: "shall be (i) based on the cost ... of providing the interconnection or network element ...." As the Interconnection NPRM correctly observes: "A broad range of parties appears to agree that rates for interconnection and unbundled elements should be based on some type of LRIC methodology, such as, for example, using what some parties refer to as a 'total service

[23] See Ameritech Comments at 65: "TSLRIC is the standard that Ameritech recommends be adopted by the Commission."

long-run incremental cost' (TSLRIC) approach."

The second principal focus of the cost comments, the recovery of "shared costs" by the ILECs, turns on semantic issues rather than fundamental differences. As the Interconnection NPRM notes (at ¶ 126): "The economists and parties, however, do not appear to agree on the specifics of a LRIC or TSLRIC methodology." See also Ameritech and BellSouth's comments, each endorsing TSLRIC.

AT&T explains the problem well in its Comments (at 62-63):

> "'Common' costs do not, as some contend, present an intractable problem with TSLRIC pricing. Properly defined, the vast majority of relevant costs are causally attributable ... Claims to the contrary generally rest on imprecise or ambiguous usage of terms like 'common,' 'joint,' and 'overhead' ... There may well be some cases of non-trivial 'common' or 'shared' costs, however, and, particularly in light of the potential for confusion and abuse in this area, it is critical that the Commission establish rules to constrain the ILECs' incentives and abilities to manipulate the quantification and allocation of 'common' or 'shared' costs in ways that thwart competition." (Emphasis supplied.)

ALTS endorses AT&T's view that the shared cost "problem" is largely exaggerated. Properly calculated TSLRIC costs dispose of the largest portion of "shared costs" issues.

### C. Costs Should Not Include the Effects of Alleged "Deals" Between ILECs and Regulators.

Perhaps the oddest attack on the ability of the Commission to adopt the rules under consideration in the Interconnection NPRM comes in the form of Ameritech's request for "legacy costs" (Ameritech Comments at 68-70). According to Ameritech: "residual costs include, among other things, the costs of a service that are not included in TSLRIC and the costs associated with the legacy of regulatory decisions, such as prescription of uneconomic depreciation rates" (id. at 68; emphasis supplied). Ameritech goes on to state that:

> "Legacy costs occur because of investments made as part of the regulatory bargain between the LEC and its regulators. For example, the LEC may have made investments to satisfy service obligations for which there are still unrecovered costs. Or the LEC may have recovered investments using uneconomically long depreciation schedules specified by regulators. Those costs still remain on the books. Residual costs cannot be ignored. The question whether these residual costs should also be recovered in the pricing of services to competitors should be left to the state commissions. At least some of this equipment and investment may be used an useful and therefore customers benefitting from their use should pay for the costs associated with the resources used" (id. at 69-70).[24]

The short answer to this claim is that Congress has directed the Commission and the states that such rates: "shall be based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element;" Section 252(d)(1). The Interconnection NPRM correctly associates such costs with TSLRIC (¶ 124), which is strictly a forward-looking costing methodology. Thus, in calculating interconnection and unbundling rates, Congress has effectively ordered that non-economic costs -- such as the "residual" and "legacy" costs

[24] In a similar vein is Bell Atlantic's assertion that rates must: "provide a contribution to any unrecovered historical costs that the LEC have actually incurred;" (Bell Atlantic Comments at 36).

Ameritech seeks to recover -- "be ignored."[25]

But there are also other fatal flaws to this contention. Ameritech claims that it suffers from "uneconomically long depreciation schedules" resulting in costs that "remain on the books." But Ameritech has taken massive write-downs in its investments in light of the emerging competition it perceives in telecommunications markets,[26] and currently enjoys immense profitability because it has escaped earnings regulation of any sort:

> "1995 was our first full year to benefit from regulatory reforms. In 1995, we became the first regional communications company with no regulatory limits on earnings in any jurisdiction, state or federal. Now we can keep all that we earn, target investments to create the most value for customers and shareowners, and respond to competition with greater flexibility." Letter of Richard C. Notebaert, Chairman and CEO, Ameritech, dated February 8, 1996, in Ameritech's 1995 Annual Report; emphasis supplied.

Ameritech's statements to its investors thus fail to reveal any concern over "uneconomically long depreciation schedules." Quite the contrary, Ameritech seems perfectly happy to have pushed for, and succeeded, in obtaining regulatory earnings

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[25] See Ameritech's claim that "historical costs above TSLRIC are typically recovered in prices" (id.). This is a dramatic rewriting of the fundamental economics of competitive markets. It is solely the effect of market forces that constrains firms in setting prices above TSLRIC, not the presence or absence of historical costs.

[26] See Ameritech's 1994 Annual Report: "The company determined that it no longer met the criteria for following [then] FAS 73 due to changes in the manner in which the company is regulated and the heightened competitive environment;" (Note 2 to Ameritech's consolidated financial statements).

freedom while letting the issue of regulatory depreciation quietly fade away until the present proceeding.[27] Certainly the passage of the Telecommunications Act of 1996 did not evoke financial fear in Ameritech's heart:

> "To strengthen our full-service communications offering, we will branch into long distance, a new $8.5 billion regional market. The new communications law opens the long distance market to us as soon as we meet a checklist of conditions, and we're confident that we can quickly meet these conditions and gain market entry in 1997." (Id.)[28]

Furthermore, the sole effect of regulatory depreciation is to permit a regulator to calculate a limit upon a regulated company's earnings. If Ameritech, by its own admission, is free of any earnings constraints, regulatory depreciation has no practical effect whatever on Ameritech. And even if there were any practical effect, recovery would have to come from the end users the regulators supposedly intended to protect -- according to Ameritech's account -- and not from competitive carriers.

Ameritech has been richly compensated as a regulated entity, as it deservedly points out in the most recent financial figures included in its annual report. Its ability to earn

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[27] To the extent that Ameritech's earnings freedom was granted by state jurisdictions in part to resolve the issue of regulatory depreciation, Ameritech has already recovered those amounts, and any further recovery of these amounts from potential competitors would clearly constitute "double-dipping."

[28] See also the Statement of Chairman Notebaert concerning passage of the 1996 Act: "It offers a comprehensive communications policy, solidly grounded on the principles of the competitive marketplace." Ameritech release dated February 1, 1996.

without limit is clearly completely disproportionate to any unrecovered amounts relating to service obligations or "legacy costs" -- amounts which Ameritech declines to quantify in any fashion in its comments. The Commission should expressly reject this blatant effort to shackle competitors through the recovery of noneconomic costs in interconnection and unbundled network elements.

### D. The Commission Correctly Rejected the "__Efficient Component Pricing Rule__."

The Commission was correct to tentatively reject the "efficient component pricing rule" ("ECPR"), and should not be swayed by certain ILECs' efforts to resurrect this pricing rule for local interconnection.[29] The ECPR[30] is a special case which depends upon special conditions that do not apply to local telephone service competition in the first place. Among these conditions, Professor Baumol has noted there cannot be monopoly rents or any misstatement of the costs of "special obligations." Given the existence of "universal service costs," which the Commission has yet to definitively quantify, this admonition is quite pertinent. Where the new entrant is more efficient in those portions of the output market where it directly competes

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[29] "Efficient Component Pricing Rule," Appendix A to the Comments of Southwestern Bell Telephone; and Doane, Sidak and Spulber, "An Empirical Analysis of Pricing Under Sections 251 and 252 of the Telecommunications Act of 1996," attached to initial comments of GTE Service Corp.

[30] Baumol and Sidak, __Towards Competition in Local Telephony__, MIT Press and AEI Public Policy Research (Studies in Telecommunications Deregulation) (1994), particularly Chapter 7.

with the incumbent, then the incumbent has an incentive to recover its inefficiency costs in the segment where it has a monopoly. Likewise, the retail service in which competition is possible must represent a contestable market, and the retail service offering of the customer for the essential input (in this case, a competitive local service entrant) must be the same as the offering of the controller of the monopoly component. Additionally, the opportunity cost recovered by the ECPR must be no higher than the same level of compensation that would be realized in a competitive market.

Local dial tone telecommunications must represent a "contestable market" in the correct sense of the term for the ECPR to be considered. This means that there would be no barriers to entry or exit in the market. The retail, or downstream, market must be contestable in order to assure that an incumbent lacks the ability to assert market power in the wholesale segment to repress competitive entry.

Local telecommunications is not a true contestable market, because there are real barriers to local telecommunications market entry that are under the control of neither regulators nor the incumbent LECS. Contestability theory is acknowledged as a special case that also must satisfy several pre-conditions in order to apply in an empirical context.[31] ECPR is likewise a

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[31] The theory adequately defines the state of "perfect contestability" of a market. If some of the conditions for the theory are missing, however, there is no corresponding state of (continued...)

special case that cannot be applied so as to allow the incumbent to recover its lost profits from a competitor unless and until its necessary conditions are proven. None of these conditions can merely be assumed to exist in the current local telecommunications market.

The ECPR has not been adapted by any telecommunications regulatory agency in this country.[32] The Economist magazine said of the ECPR, "requiring entrants to reimburse utilities for lost revenues .. looks like a monopolist's charter."[33] When the ECPR was adopted in New Zealand, local public switched service competition was stifled. The Office of Telecommunications in the United Kingdom examined the ECPR as part of its effort to try to

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(...continued)
"imperfect contestability." "Imperfect contestability may be like an individual who is said to be "imperfectly healthy" - a characterization that encompasses everything from a sniffle to a fatal illness. If a market is "imperfectly contestable," additional economic analyses are required in order to adequately supplement the Baumol/Willig model.

[32] The ECPR was rejected by the Maryland Commission, which recently strongly restated its conclusion that such pricing was inappropriate. In re MFS Intelenet of Maryland, Case No. 8584, Order No. 71155 (April 25, 1994), 53-56. Likewise, the Commission refused to adopt this approach because it would: "unreasonably discourage the use of expanded interconnection" and "would reduce the consumer benefits of competition as an incentive for improved LEC efficiency and innovation." Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 94-141, October 19, 1992, ¶ 144.

[33] The Economist, 20 November 1993, 84: "By requiring entrants to reimburse utilities for lost revenues, ECPR looks like a monopolist's charter. Baumol and Sidak say that the result should mimic a contestable market. But the 'contestable market' has rightly been criticized as a 'special case' which requires each and every one of several conditions to be accurate."

quantify British Telecom's so-called access-deficit contribution ("ADC"), but recently decided not to allow BT to recover any ADC from market entrants.[34] Affiliates of regional Bell companies competing with British Telecom in the UK both strongly supported the Oftel decision.[35]

### E. Interconnection

Several commentors attempt to make the claim that "technically feasible" provision includes considerations of "economic feasibility," and that the "nondiscriminatory language of Section 251 simply reenact the "not unjustly or unreasonably discriminatory" standard of the 1934 Act.[36] USTA asserts that the 1996 Act's legislative history fails to "provide much guidance to how this requirement should be implemented;" (USTA Comments at 10).

ALTS respectfully suggests that the "technically feasible" and "nondiscriminatory" language of Section 251(c)(2) have a robust legislative history which fully demonstrate these claims are meritless. The telecommunications proposal which passed the Senate in 1994, the 'Communications Act of 1994," S. 1822,

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[34] Oftel, "Effective Competition: Framework for Action: A Statement on the Future of Interconnection, Competition and Related Issues," July 1995.

[35] See, e.g., Cable World, July 1, 1995, p. 14. "Eugene Connell, the President-CEO of NYNEX Cablecomm, the UK'S second-largest cable operator ... welcomes the [Oftel] move. 'Access-deficit charges distort a competition-based market and effectively tax the success of BT's emerging competitors.'"

[36] See, e.g., US WEST Comments at 48-50; USTA Comments at 10.

imposed an obligation to provide interconnection and unbundling "at any technically and economically feasible point" and at "rates that are just and reasonable and not unjustly or unreasonably discriminatory"(§ 230(c)(1)(A),(B); emphasis supplied). The legislative history is clear this standard was requested by the ILECS: "the interconnection and unbundling requirements generally apply only where 'technically and economically feasible,' which was the standard suggested by Mr. Cullen, President of Bell Atlantic, in his testimony" (S.REP. No. 103-367, at 57, citing the May 18, 1994, testimony of Mr. Cullen, Hearings on S. 1822 Before Committee on Commerce, at 569). However, the bills which passed the Senate and the House of Representatives in 1995 each omitted the "economically feasible" language of S. 1822, and substituted "nondiscriminatory" for "not unjustly and unreasonably discriminatory" (see CONF. REP. on S. 652, § 251).

Congress' decision not to employ "economically feasible," and the well-understood term of art "not unjustly or unreasonably discriminatory" in the 1995 versions of the legislation is thus clear and unequivocal. Having failed in its lobbying efforts to retain either of these provisions in the 1995 versions of the bills passed by the House and the Senate, USTA is now asking the Commission to give back what it clearly lost in 1995.

### F. Reciprocal Compensation

No commentor has rebutted the fact that Congress' reservation of the right to "bill-and-keep" arrangements in Section 252(d)(2)(ii) only makes sense if it reflects the right of a new entrant to demand such agreements.[37] Furthermore, claims that such arrangements are an unconstitutional "taking" (see USTA Comments at 84) are plainly incorrect. As the Washington Commission aptly noted in rejecting such assertions:

> "The Commission is persuaded that, while bill and keep lacks the appropriate price signals that are essential to an efficient competitive telecommunications market, incumbents will not be financially harmed by adopting bill and keep on an interim basis. Any potential harm would not occur until current barriers to competition are eliminated and competitors gain more than a de minimus market share."

BellSouth contends that: "LECs have substantial embedded costs that still must be recovered;" (BellSouth Comments at 73). Whether or not BellSouth is correct in its claim, Section 252(d)(2)(A)(ii) refers to "costs on the basis of a reasonable approximation of the additional costs of terminating such calls," a standard which obviously precludes recovery of embedded costs.

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[37] See Ameritech's Comments at 78-79, which are unable to explain Section 252(d)(2)(B)(i) except as an authorization of voluntary bill-and-keep arrangements. In particular, Ameritech states that it: "has no objection to [the Michigan arrangement allowing bill-and-keep so long as traffic is within 5% balance] on an interim basis;" id. at 79, n. 115.

Bell Atlantic relies on Congress' use of the word "waive" to show such agreements are strictly consensual, rather than as of right, but offers no additional authority (Bell Atlantic Comments at 41). See also BellSouth Comments at 73: "The provision is a rule of construction instructing state commissions regarding their review of negotiated agreements that include arrangement that waive mutual recovery of costs." The fatal flaw in these arguments, as the Interconnection NPRM notes, is that Congress' authority is not needed for parties to waive cost-based recovery, and employ an exchange of value, such as bill-and-keep. The only way to give meaning to this language is to treat it as an independent grant of the right to demand bill-and-keep agreements.

Beyond the persuasiveness of the legislative history lies a powerful pragmatic consideration. New entrants as well as the ILECs which have to bear the costs of interconnection. Consequently, it is very much in the interests of new entrants to pursue the most efficient forms of interconnection.

## G. Unbundling

Several commentors complain about the cost of responding to requests for unbundled network elements. Much like interconnection, they contend they should be able to: "require requesting carriers to post bond or pay liquidated damages in the event of their nonperformance following an unbundling request;" (BellSouth Comments at 36). Just as with interconnection, ALTS has no objections to ILECs recovering their reasonable, identified unbundling costs. Furthermore, where requests would impose identified, appreciable up-front costs upon an ILEC, it should be entitled to request some reasonable assurance of compensation in the event the service is never ordered. However, the fairness of such mechanisms necessarily depends on the facts involved. Hopefully, as unbundled element requests become common, the associated transaction costs should become minimal. In any event, there is no need for the Commission to require bona fide requests or similar mechanisms at the present time.

Bell Atlantic makes a specific request concerning unbundled elements which is not contained in the Interconnection NPRM. According to Bell Atlantic, "all arrangements provided by an incumbent LEC for a competing carrier [should] be made reciprocal;" (Bell Atlantic Comments at 31), because (1) entry facilities at new construction may be in the hands of a new entrant, thus forcing the ILEC to construct new facilities of its own; and (2) reciprocal requirements would put a "real world" check on supposedly unrealistic requests (id.).

Bell Atlantic's request is a blatant end-run around the clear structure of carrier obligations created by Congress in Section 251.[38] The interconnection and unbundling obligations of Section 251(c)(2) and 251(c)(3) are carefully imposed only upon "Incumbent Local Exchange Carriers," and the Commission -- not the states -- can treat other carriers like ILECs only by using the provisions of 251(h)(2), which require that such other carrier "occupies a position in the market for telephone exchange service that is comparable to the position" of the ILEC and ""such carrier has substantially replaced an incumbent local exchange carrier" and "such treatment is consistent with the public interest, convenience, and necessity."

The policy basis for Congress' careful decision not to require reciprocal Section 251(c) obligations until new entrants meet these robust screens is obvious. ILECs have ubiquitous networks and 100% market share. They have no need, at the present time, to press obligations upon new entrants except as a means of harassment.

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[38] Bell Atlantic's proposal is significant, however, in recognizing that end users may be accessed via unbundled entry facilities without any need to execute any understanding or obligation via the premises owner.

### H. Collocation

Ameritech claims that the term "premises" in the collocation provisions of Section 251(c)(6) should not be given its natural meaning because "there are legal and contractual restrictions on the placement of equipment belonging to third parties at most of such locations;" (Ameritech Comments at 23). But these considerations, assuming they prove true, can be dealt with in factually-specific situations, rather than by arbitrarily narrowing the application of Section 251(c)(6).[39]

Similarly, Ameritech claims Congress' conferral of a duty to provide physical collocation except where space is limited, in which case ILECs must provide virtual collocation, amounts to a withdrawal of a more general power to order virtual collocation where space is not a problem (Ameritech Comments at 24).[40]

Ameritech is torturing the language of Section 251(c)(6), which is simply an amplification of the more general network unbundling and interconnection requirements contained in Sections 251(c)(2) and 252(c)(3). Indeed, Ameritech fails to identify any sound reason why Congress would have sought to withdraw a power

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[39] Thus, if similar factual allegations set forth by Bell Atlantic Affiant Albers are correct, they should be addressed in specific negotiations or follow-on rulemakings, and not used to preclude interconnector-competitors from even exploring the possibility of collocating on premises other than central offices.

[40] Compare with Bell Atlantic's request that existing virtual collocation requirements be reimposed under Section 251(c)(6)(Bell Atlantic Comments at 32-33).

to order virtual collocation from the Commission in any situations in which the Commission concludes it better accomplishes the purposes of Section 251(c). Inasmuch as the Commission was vigorously exercising its virtual collocation powers at the time the Act was passed, any such withdrawal of power would have to be made much more explicitly than in the passage relied upon by Ameritech.

### I. Play or Pay Provisions Have to Be Adopted -- If Adopted at All -- In Conjunction with the Universal Service Provisions of the Act.

The New York Public Service Commission makes a spirited defense of its "pay-or-pay" requirements, which imposes interconnection rates which are linked to a carrier's service commitments (NYPSC Comments at 1-17). Whatever the merits of the NYPSC's policy choice, it could only be accommodated in the current universal service proceeding. Under Section 251, rates must reflect the costs of providing the service, except for such universal service exceptions as the Commission and the Joint Board eventually accept.

## III. THE PROCEDURAL ASPECTS OF THE INTERCONNECTION NPRM ARE WELL-FOUNDED.

### A. The Wisconsin PSC Agrees with the *Interconnection NPRM* that Existing State Interconnection Agreements Must Be Filed.

The Wisconsin Public Service Commission has concluded that existing interconnection agreements among ILECs are required to be filed for state approval by Section 252(a)(1)(appended as

Attachment B).[41] The Wisconsin PSC's decision, dated May 16, 1996, provides a detailed listing of the various kinds of such agreements, the dates on which they must be filed, and indicates the Commission's strong preference that such agreements "not be filed pursuant to confidentiality requests."

Contrary to USTA and BellSouth's assertions (USTA Comments at 68-70; BellSouth Comments at 11), the Wisconsin PSC, which is chaired by the head of NARUC's Subcommittee on Communications, is clearly correct as to Section 252(a)(1), as well as sound policy. As Ameritech pointed out in its letter to Chairman Hundt dated April 12, 1996, independent telephone companies are among the new potential competitors created by the 1996 Act,[42] and the only effective way to insure that <u>other</u> new entrants have access to the same interconnection arrangements enjoyed by the independents is to implement Section 252(a)(1)'s requirement that they be filed for state approval, and then are made available to requesting carriers pursuant to Section 252(i).

While other states are likely to arrive at the same conclusion, there is no reason to permit inconsistent outcomes on so crucial a point. The need for prompt national action is particularly telling given the need to measure existing RBOC-ITC

[41] The Arkansas Public Service Commission entered a similar decision on April 1, 1996.

[42] <u>Compare</u> SWB's assertion that: "The Act reflects that Congress did not intend to modify any agreements between non-competing ILECs;" (SWB Comments at 53).

agreements against the agreements offered new entrants in the context of the RBOCs soon-expected petitions to enter in-region long distance service under Section 271. The Commission should incorporate the conclusions of the Wisconsin PSC and Arkansas PSC into its final rules.

### B. Approved Agreements Must Be Unbundled Under Section 252(i).

The Commission also should not accommodate the fears raised by USTA that "permitting requesting carriers to pick and choose provisions would skew radically the individualized nature of interconnection and unbundling negotiations, and would greatly magnify the importance of each individual term of an agreement;" (USTA Comments at 96-97). No commentor is seeking the atomistic unbundling which USTA attacks. Rather, ALTS seeks only what the statute demands: "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section;" Section 252(i); emphasis supplied.[43] If Congress thought that the specific items

[43] Compare with SWB's citation of Section 252(i), where SWB omits the word "any;" (SWB Comments at p. 24). See also Ameritech's argument that the availability of agreements to nonparties under Section 252(i) constitutes a leveling of bargaining power (Ameritech Comments at 9). Ameritech implicitly concedes that such agreements have to be available on an unbundled basis in order to have such an effect, since Ameritech emphasizes the "unique carrier needs" that make it "simply impossible to anticipate all permutations of the highly technical and complex issues -- and new and innovative solutions to those issues -- that arise in the context of carrier-to-carrier interconnection;" (id. at 7). Obviously, the availability of "unique" carrier-to-carrier agreements would be meaningless as a means of leveling bargaining power unless they were available on an unbundled basis.

contained in the separate subsections and paragraphs of Section 251 were important enough to warrant separate enumeration, it follows that the agreements themselves should be unbundled to the same level.[44]

### C. Confidentiality of Negotiations

US WEST contends that: " ... A party to a negotiation could legitimately desire to keep a particular offer, or negotiating position, confidential, at least until such offer or position had been accepted;" (US WEST Comments at 39). ALTS readily agrees there might be technical information which parties to a negotiation could seek to protect, even given an obligation to bargain in good faith. Unfortunately, US WEST fails to offer any example of a situation where an <u>offer</u> -- as opposed to some technical or proprietary information -- would need to be concealed except to prevent evidence as to a <u>lack</u> of good faith bargaining from being used against the company making the offer.[45]

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[44] An exception is Section 252(c)(3), where unbundled network elements should be available <u>individually</u> per the subsection's requirement.

[45] Bell Atlantic complains in its comments that: "the only potential examples of bad faith witnessed to date have been exhibited by a very limited number of potential interconnectors -- not by incumber LECs;" (Bell Atlantic Comments at 49; emphasis in original), and, as an example, asserts that interconnectors "requested interconnection arrangements that they have not bona fide interest in actually purchasing." ALTS agrees that the burden of good faith negotiation falls equally on interconnectors, but cannot respond to Bell Atlantic's claims without facts.

What is clear, however, is that claims for <u>blanket</u>

(continued...)

## D. Treatment of Similarly-Situated Carriers

BellSouth contends it should be free to distinguish among carriers in complying with Section 252(i)'s requirements that approved agreements be made available to non-party carriers. According to BellSouth: " ... The terms 'nondiscriminatory' in the 1996 Act and 'unreasonable discrimination' in the 1934 Act have the same meaning, and that each prohibits only unreasonable discrimination as between similarly situated carriers;" (BellSouth Comments at 80). But BellSouth is laboring under a serious confusion. The "nondiscriminatory" language is contained in Section 251 -- not Section 252(i). The "nondiscriminatory" language in Section 251 creates a sword whereby requestors can demand to be treated as the ILECs treats other entities or even itself. It clearly is not intended to permit ILEC to shield themselves from requests from other differently-situated carriers, and thus cannot be among the "conditions" which apply to requesting carriers under Section 252(i).

Furthermore, the Conference Committee's explanation of Section 252(i) makes it crystal-clear that approved agreements must be made available to all carriers (REP. No. 104-458, 126):

> "New section 252(i) requires a local exchange carrier to make available on the same terms and conditions to any

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(...continued)
confidentiality, as opposed to targeted requests linked to proprietary concerns, is tantamount to a demand for a "get out of jail free" card concerning the "good faith' bargaining requirement.

> telecommunications carrier that requests it any interconnection, service, or network element that the local exchange carrier provides to any other party under an approved agreement or statement." (Emphasis supplied.)

Beyond the absence of any statutory foundation for BellSouth's argument lie powerful policy considerations. The Commission has long employed a robust requirement prohibiting restrictions on resale and sharing even under the "not unjust and unreasonable discriminatory" standard BellSouth claims to find here.[46] Now that Congress has imposed a stricter standard of discrimination by which a carrier requesting interconnection under Section 252(c) can protect itself, and also a provision allowing all other carriers without restriction to order "any" portion of such agreements, it would make no sense for the Commission to abandon its traditional resale and sharing prohibition, and proceed to allow the ILECs to destroy Congress' goal by concocting "similarly situated carriers" restrictions in Section 251(c) agreements.

There is no such thing as a "similarly situated carrier" restriction under existing resale and sharing policy. There is even less need for such a beast under Section 251(c) and 252(i). Congress plainly created no fences around the kinds of carriers

[46] See, e.g., Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261, 321 (1976), amended on recon., 62 FCC 2d 588 (1977), aff'd sub nom. AT&T v. FCC, 572 F. 2d 17 (2d Cir.), cert. denied, 99 S. Ct. 213 (1978), and recently reaffirmed in In the Matter of US West Tariff F.C.C. Nos. 3 and 5, Trans. No. 629, released September 28, 1995, at ¶ 11: "The Commission found that numerous public benefits would flow from unlimited resale and sharing activity."

which are entitled to request the matters set forth in Section 251(c), or the uses to which they could be put. Accordingly, the Commission should not permit the ILECs to control matters which Congress has decided are better left to the market.

## CONCLUSION

For the foregoing reasons, ALTS requests that the Commission adopt the proposed rules set forth in Attachment A.

Respectfully submitted,

By: Richard J. Metzger

Richard J. Metzger
Emily M. Williams
Association for Local
Telecommunications Services
1200 19th Street, N.W., Suite 560
Washington, D.C. 20036
(202) 466-3046

May 30, 1996

ATTACHMENT B

# Public Service Commission of Wisconsin

Cheryl L. Parrino, Chairman
Scott A. Neitzel, Commissioner
Daniel J. Eastman, Commissioner

Jacqueline K. Reynolds, Executive Assistant
Lynda L. Dorr, Secretary to the Commission
Steven M. Schur, Chief Counsel

To: All Local Exchange Carriers

Re: Investigation of the Implementation of the Telecommunications Act of 1996 in Wisconsin 05-TI-140

At its open meeting of May 16, 1996, the Commission determined that § 252(a)(1) of the Telecommunications Act of 1996 ("Act") requires that all incumbent local exchange carriers (LECs) obtain Public Service Commission (PSC) approval of all agreements with other providers covering telecommunications services. All approved agreements will then become generally available to other telecommunications providers. Such agreements must also be made available to the general public by the PSC for copying ten days after approval. Except for services purchased under generally available tariffs at tariffed rates, § 252 covers all agreements for telecommunications services provided to other telecommunications providers. Agreements requiring filing and approval include those under s. 196.194(1), Wis. Stats., and contracts or agreements associated with a tariff, per s. 196.19(2), Wis. Stats., if made with other telecommunications providers.

Contracts and agreements which had expired and had not been renewed and agreements which had been completely terminated and/or renegotiated prior to February 8, 1996, (the date on which the Act became effective) need not be filed. Likewise, contracts which have expired between February 8, 1996, and the date of this order, and have not been renewed or renegotiated, also need not be filed.

Agreements should be filed with the Commission according to the schedule listed below. Five copies are required of the agreement and cover letters. The agreements should be addressed to Lynda L. Dorr, Secretary to the Commission, Public Service Commission of Wisconsin, P.O. Box 7854, Madison, Wisconsin 53707-7854. If electronic copies of these agreements exist, the providers should also file an electronic version, in WordPerfect 5.1 format.

All agreements should be filed as joint filings, with both providers filing cover letters. The joint filings will prevent duplicate filings and problems due to an agreement being filed simultaneously as both confidential and nonconfidential. Each cover letter should state whether the signatory party recommends that the Commission approve or reject the agreement. If a party to the agreement recommends that the agreement not be approved, the party must provide a full explanation of why that agreement should not be approved.

The providers should also jointly agree on whether the agreement will be filed under confidential cover. If the agreement is to be confidential, it must be accompanied by the appropriate form. All approved agreements must be made public ten days after Commission approval, as required by federal law. Therefore, confidentiality cannot be requested beyond ten days after the Commission approves the agreement. **Given this situation, and because of the significant administrative burdens created by the confidentiality requirements, the Commission *strongly* recommends that such agreements *not* be filed confidentially.**

Companies need only file those agreements that have not already been filed. For example, Wisconsin Bell, Inc. (Ameritech), will file all Extended Area Service (EAS) agreements between it and the independent companies by July 1, 1996. The independent companies (ICOs) are to file all their remaining EAS agreements by November 1, 1996. At that time the ICOs will not need to refile those agreements which were filed by Ameritech on July 1, 1996.

Where companies have a number of agreements that have the same rates, terms and/or conditions, the company should file five copies of a sample of the agreement or identical language, together with a list of all identical agreements or agreements using that language. If the terms and conditions of the agreements are the same, but the rates differ, the company can file a sample of the terms and conditions, together with copies of just the pages from each agreement showing the differing rates. Where a company has a number of similar agreements and is recommending that the Commission reject each of those agreements for the same reasons, the company can file five copies of the argument and rationale for rejection separately--rather than including the complete argument in each cover letter -- and simply cite those reasons in the cover letters accompanying each filing.

Many of the agreements to be filed will be between Ameritech and the ICOs (or GTE North Incorporated [GTE] and the ICOs). As a result, the Commission will be considering approval of agreements involving ICOs beginning July 1, 1996. The Act allows the Commission only 90 days to consider such agreements, therefore any ICOs wishing to obtain rural telephone company exemptions will need to file a request for such exemptions within 60 days of the date of filing. The Commission will hold a technical conference in early June to clarify the procedures for filing such exemptions.

For the purposes of this schedule, the various agreements which must be filed are divided into the following categories:

> **Direct Interconnection**: This category includes agreements for the termination of local calls originated on one provider's network and terminated on that of the other provider that are not included in the EAS or Extended Community Calling (ECC) categories.

**EAS**: EAS agreements are for the transport and termination of extended area service calls.

**ECC**: ECC agreements are for the transport and termination of extended community calling calls.

**Toll transport**: Toll transport agreements relate to the handling of, and compensation for, interexchange transport and routing.

**Other toll services**: These include agreements covering the handling of Feature Group B (FGB), revenue sharing for Feature Group A (FGA), and similar agreements covering toll services which are not filed in the toll transport or toll recording category.

**911**: This category covers contracts for 911 service, plus agreements over the routing of emergency calls and compensation for such emergency calls and associated networks.

**DA:** This category covers agreements and contracts for directory assistance.

**Directory Listings:** This category covers agreements for the sharing, sale, or use of directory listings, and for distribution of directories.

**OS:** This category covers agreements and contracts involving operator services (except for directory assistance). This also includes agreements for providing Traffic Service Position system (TSPS) service to Customer-Owned Coin-Operated Telephones (COCOTs).

**Toll Recording**: This category includes agreements and contracts for performing rating and/or recording of toll calls at another end office or tandem, when the end office does not have that capability.

**SS7**: This category includes agreements for providing Signalling System 7 services through the tandem or another remote office, for interconnection to signal transfer points (STPs) and other SS7 equipment and databases, and also includes agreements for 800 number translation and WATS serving offices.

**Switcher Areas**: This category covers agreements under which one LEC provides switching services for a portion of another LEC's exchange.